SUPREME COURT, U. S.

APR 28 1967

JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1104

E. G. SWINDLEHURST,
Petitioner,
vs.
AMERICAN FIDELITY FIRE INSURANCE COMPANY, a foreign insurance company, and HENRY SALES, d/b/a Sales Welding,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

FRED ROLAND ALLABEN
(Counsel of Record for Respondent American Fidelity Fire Insurance Company)
408 Federal Square Building
Grand Rapids, Michigan 49502

KEITH A. VANDER WEYDEN
408 Federal Square Building
Grand Rapids, Michigan 49502
(Of Counsel)

STEPHEN T. ROUMELL
(Counsel of Record for Respondent Henry Sales d/b/a Sales Welding)
New Buffalo, Michigan 49117

AMERICAN BRIEF AND RECORD COMPANY, FIFTY MARKET AVENUE, N.W., GRAND RAPIDS, MICHIGAN 49502 — PHONE GL 8-5326

TABLE OF CONTENTS

	Page
Question Presented For Review	1
Concise Statement Of The Case	1-3
Argument	3-4

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1104

E. G. SWINDLEHURST,
Petitioner,
vs.
AMERICAN FIDELITY FIRE INSURANCE COMPANY,
a foreign insurance company, and
HENRY SALES, d/b/a Sales Welding,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

QUESTIONS PRESENTED FOR REVIEW

Respondent Henry Sales, d/b/a Sales Welding does not accept petitioner's question presented. A more concise statement of the question before the court is as follows:

> Where the plaintiff failed to introduce material evidence of non-compliance with the garage-keeper's lien law, (CL 1948, 570.301 et seq (Stat Ann 1960 Rev 9.1711 et seq)), plaintiff failed to establish a prima facie case of conversion; Thoma v. Tracy Motor Sales (1960), 360 Mich 434.

CONCISE STATEMENT OF THE CASE

This is a suit for the alleged conversion of plaintiff's 1950 Ford tractor and trailer. In September, 1950, plaintiff E. G. Swindlehurst was the owner of a tractor and

steel hauling trailer which were damaged in an accident. The equipment was insured with defendant American Fidelity Fire Insurance Company (hereinafter referred to as AFFI Co.) under separate policies $250 deductible collision insurance. Both policies gave the AFFI Co. the option of repair. AFFI Co. took possession of the damaged equipment, placing the trailer with defendant Henry Sales and the tractor with C. C. Creed, Inc. (hereinafter referred to as Creed) for the necessary repairs. Swindlehurst considered the repair work done by Sales and Creed to be unsatisfactory and refused to pay the $250 deductible due each for their work under the terms of the insurance policies or to retake possession of the equipment. Negotiations between the parties did not lead to any solution and a long record of litigation precedes the instant case.

In July, 1951, Swindlehurst brought a suit for breach of contract against AFFI Co. in Ingham county circuit court (No. 15,922). At the conclusion of Swindlehurst's proofs, AFFI Co.'s motion for a directed verdict of no cause of action on the merits was granted by the court, based on a failure to present proof as to damages. Swindlehurst's motion for a new trial was denied and no appeal was taken.

Separate suits were brought by Sales (Berrien county No. 9754) and Creed (Berrien county No. 9935) for the cost of repairs and storage charges, naming Swindlehurst and the AFFI Co. as defendants. A settlement was reached between Creed and the AFFI Co., and that suit was dismissed. The suit brought by Sales resulted in judgment on January 14, 1955, against AFFI Co. with the court finding that Sales "completed those repairs in a good, workmanlike manner", and further finding no cause of action as to Swindlehurst, based on the absence of privity of contract. On that day the plaintiff and the defendant Sales entered into an agreement that plaintiff would remove the trailer in 2 or 3 days without charge for storage, and that if plaintiff did not do so, there would be a charge for storage at the rate of $2 per day. Plaintiff Swindlehurst continued to refuse to take possession of the trailer and, about 9 months later, on October 19, 1955 (this being more than

5 years after defendant Sales received the trailer), defendant Sales, pursuant to the provisions of the garage-keeper's lien statute, (CL 1948, 570.301 et seq (Stat Ann 1960 Rev 9.1711 et seq)), sold the trailer. The Ford tractor had been sold by Creed on April 12, 1954, pursuant to the provisions of the garage-keeper's lien statute, supra.

In April, 1956, Swindlehurst brought suit against AFFI Co. in Ingham county (Circuit Court No. 18020) demanding damages of $65,000.00 for breach of contract and loss of profits. After hearing part of the proofs the trial court ordered that a judgment of no cause of action be entered in favor of AFFI Co., holding that the issues had been previously adjudicated in the first suit tried before the Ingham county court and in an opinion, filed May 3, 1957, denying plaintiff's motion for a new trial, said:

> "The first case (Ingham County No. 15922) was based on what amounts to a conversion. The instant case is the same. If the plaintiff is right in the instant case, he should have appealed from the judgment entered in the former case.
>
> Motion for a new trial is denied."

The instant action for conversion was brought by Swindlehurst in September, 1957, naming AFFI Co., Sales and Creed as defendants. An order was entered in 1958, dismissing Creed as a party defendant. Defendant Sales entered a plea of general denial; defendant AFFI Co. pleaded affirmative defenses of res judicata, split cause of action, election of remedies, and statute of limitations, and a plea of general denial. AFFI Co., motion to dismiss based on res judicata and the statute of limitations was denied by the Ingham county circuit court. The defendants' application for leave to appeal that decision was denied by the Supreme Court.

ARGUMENT

Nothing was said or done until after expiration for period of appeal which would indicate a federal and/or

constitutional question on the part of plaintiff-appellant. In this respect Defendant Henry Sales associates and includes as a part of his argument arguments set forth in brief in opposition by the American Fidelity Fire Insurance Company.

Respectfully submitted,

STEPHEN T. ROUMELL

(Counsel of Record for Respondent Henry Sales d/b/a Sales Welding)

New Buffalo, Michigan 49117